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 RED HILL LAW GROUP, P.C.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CORAZON GAERLAN REYES,

Plaintiff,

vs.

CREDIGY RECEIVABLES, INC., a
 Nevada corporation; CREDIGY
 SERVICES CORP., a Nevada
 corporation; PHOENIX LAW GROUP
 CORP., a California corporation; RED
 HILL LAW GROUP, P.C., a California
 corporation; JAY MICHAEL
 TENENBAUM, individually and in his
 official capacity; IAN NATHAN
 WILLENS, individually and in his
 official capacity; RONALD R.
 ROUNDY, individually and in his
 official capacity; MICHAEL
 CHARLES BRICK, individually and
 in his official capacity,

Defendants.

CASE NO. CV 12-05811 EJD

**NOTICE OF MOTION,
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANT RED HILL LAW
 GROUP, P.C.'S SPECIAL MOTION
 TO STRIKE (ANTI-SLAPP-CAL.
 CODE CIV. PROC 425.16),**

Judge: Hon. Edward J. Davila

Date: March 22, 2013
 Time: 9:00 a.m.
 Courtroom: 4

**[Filed concurrently with the
 Declaration of Bert Briones and
 [Proposed] Order]**

PLEASE TAKE NOTICE that on March 22, 2013 at 9:00 a.m. or soon
 thereafter as the matter may be heard, in Courtroom 4, 5th Floor of the above
 referenced Court, located at 280 South First Street San Jose, CA, Defendant Red
 Hill Law Group, P.C. ("Red Hill") will and hereby does move the Court for an order

1 to strike Plaintiff's claim for malicious prosecution against Red Hill.

2 This Motion is made on the grounds that Red Hill did not sue Plaintiff, Red
3 Hill did not direct anybody to be sue Plaintiff, Red Hill is not an agent of any of the
4 co-defendants of this lawsuit, and none of the co-defendants of this lawsuit are
5 agents of Red Hill.

6 This Motion is based on this Notice of Motion and Motion, the accompanying
7 Memorandum of Points and Authorities, the Declaration of Bert Briones, and all
8 papers, pleadings, and records on file in this action, and any further argument or
9 evidence as may be presented at the hearing on this Motion.

10
11
12 DATED: January 31, 2013

STEPHEN H. TURNER
LEWIS BRISBOIS BISGAARD & SMITH LLP

13
14
15 By 

16 Stephen H. Turner

17 Attorneys for Defendant RED HILL LAW
18 GROUP, P.C.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As is established by the exhibits to plaintiff's own complaint¹, as to defendant Red Hill Law Group, LLC. ("Red Hill"), plaintiff cannot prevail on her claim for malicious prosecution because **Red Hill never sued plaintiff.** Therefore this anti-SLAPP motion brought by Red Hill must be granted.

Plaintiff begins her complaint by alleging:

"Defendants wrongfully sued Plaintiff in a sham judicial foreclosure action that was nothing more than a materially false and misleading attempt to collect on a dormant judgment based on an unsecured credit card debt that was more than ten (10) years old."²

The obvious flaw in plaintiff's allegation is Red Hill never sued plaintiff. Copies of the complaint and first amended complaint filed in the "allegedly sham foreclosure action" ("Foreclosure Action") are attached to the complaint as Exhibits 10 and 12. Neither were filed by Red Hill. Indeed, none of the pleadings in the Foreclosure Action were filed by Red Hill, because Red Hill never sued plaintiff.³ Consequently, as to Red Hill, plaintiff cannot prevail on her claim for relief for malicious prosecution. Therefore, this motion must be granted.

¹ The original complaint and the first amended complaint in the underlying lawsuit which is the basis for the claim for relief for malicious prosecution, Exhibits 10 and 12 to the complaint filed in this action, were both filed by defendant The Phoenix Law Group. They were not filed by Redhill.

² Complaint, ¶1 at page 2 lines 6-8.

³ Decl. of Bert Briones, ¶ 2.

1 **II. FACTUAL BACKGROUND**

2 Although two lawsuits underlie this action, plaintiff's claim for malicious
3 prosecution is based on only the second. According to plaintiff's own allegations,
4 on February 25, 2000, First Select Corporation filed a collection lawsuit against
5 plaintiff ("First Select Action").⁴ Thereafter, a judgment was entered against
6 plaintiff.⁵ Plaintiff's claim for malicious prosecution is not based on this lawsuit.
7 Indeed, it cannot be because plaintiff was not the prevailing party. Plaintiff's claim
8 is based upon the second lawsuit, the Foreclosure Action.⁶ As was previously noted,
9 Red Hill did not file or prosecute that action.

10 According to plaintiff's own allegations, Red Hill's only involvement in
11 either of the underlying lawsuits was in the First Select Action in which Red Hill
12 filed an Assignment of Judgment; applied for a renewal of the judgment (the
13 judgment in the First Select Action); and applied for an abstract of judgment. Those
14 three documents are attached to the complaint in this action as Exhibits 8, 9; and 10.
15 Red Hill never sued plaintiff and did not direct those who did.⁷

16 **III. RED HILL HAD NOTHING TO DO WITH THE FORECLOSURE** 17 **ACTION**

18 Red Hill will only briefly belabor the point which it has already made: it
19 neither filed or prosecuted the Foreclosure Action nor directed those who did.⁸ In
20 paragraph 21 of the Complaint, Plaintiff makes the formulaic allegation: "each of
21 the Defendants was an officer, director, agent, servant, employee and/or joint
22

23 ⁴ Complaint, ¶ 23.

24 ⁵ Complaint, ¶ 24.

25 ⁶ Complaint, ¶ 1.

26 ⁷ Decl. of Bert Briones, ¶ 3.

27 ⁸ *Id.*

venture of his co-defendants.”⁹ As to Red Hill, however, the allegation is incorrect.

At the time the Foreclosure Action was filed, and during the time it was prosecuted, Red Hill was not the agent of any co-defendant, and no co-defendant was the agent of Red Hill.¹⁰ Neither Red Hill as a corporate entity, nor Red Hill’s sole owner, Bert Briones, have ever had an ownership interest in any co-defendant¹¹, and Mr. Briones, has never been an officer, director or employee of any co-defendant.¹²

IV. RED HILL’S ANTI-SLAPP MOTION MUST BE GRANTED

A. The Anti-SLAPP Statute Generally

In 1992, the California Legislature enacted the anti-SLAPP statute in order to combat increasing use of lawsuits designed to chill “a party’s constitutional right of petition.” *State Farm General Ins. Co. v. Majorino*, 99 Cal. 4th 974, 975 (2002). Commonly, “SLAPP suits are brought to obtain economic advantage over the defendant, not to vindicate a legally cognizable right of the Plaintiff.” *Id.* at 1126 (citing *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 815-816 (1994)).

California Code of Civil Procedure § 425.16 provides in part:

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that

⁹ Complaint, ¶21.

¹⁰ Decl. of Bert Briones, ¶ 4.

¹¹ Decl. of Bert Briones, ¶ 5.

¹² Decl. of Bert Briones, ¶ 6.

1 there is a probability that the plaintiff will prevail on the
2 claim.

3 (2) In making its determination, the court shall consider
4 the pleadings, and supporting and opposing affidavits
5 stating the facts upon which the liability or defense is
6 based.

7 (3) If the court determines that the plaintiff has established
8 a probability that he or she will prevail on the claim,
9 neither that determination nor the fact of the determination
10 shall be admissible in evidence at any later stage of the
11 case, or in any subsequent action, and no burden of proof
12 or degree of proof otherwise applicable shall be effected
13 by that determination in any later stage of the case or in
14 any subsequent proceeding.

15 The California Legislature has defined the activities protected by the anti-
16 SLAPP statute. The first category of protected activity includes, "any written or oral
17 statement made before a legislative, executive, or judicial proceeding, or any other
18 official proceeding authorized by law." California Code of Civil Procedure §
19 425.16(e)(1).

20 The statute was amended in January 1997 to prevent conflicting interpretations
21 of the statute issued by the appellate courts. The Legislature stated that henceforth
22 the statute "shall be construed broadly." California Code of Civil Procedure §
23 425.16(a) (emphasis added); *see also Rohde v. Wolfe*, 154 Cal. App. 4th 28, 35
24 (2007) ("[S]tatements, writings and pleadings in connection with civil litigation are
25 covered by the anti-SLAPP statute, and that statute does not require any showing
26 that the litigated matter concerns a matter of public interest").

27 **B. An Anti-SLAPP Motion May be Brought in Federal Court**

28 The court in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.

1 Supp. 2d 1127 (N.D. Cal. 1999), considered whether the anti-SLAPP statute applied
 2 in federal court. In holding that the anti-SLAPP statute was applicable to claims in
 3 federal court, the court found:

4 With respect to the applicability of the anti-SLAPP statute
 5 to claims filed in federal court, the Court turns to a recent
 6 decision from the Ninth Circuit, *United States v. Lockheed*
 7 *Missiles and Space Co., Inc.*, 171 F.3d 1208 (9th
 8 Cir.1999), in which the Ninth Circuit held that the statute
 9 was applicable to state law counterclaims asserted in a
 10 federal diversity action. The Court concluded that
 11 application of the statute to such claims would not result in
 12 a 'direct collision' with the Federal Rules. The Court went
 13 on to perform an *Erie* analysis, concluding that important
 14 substantive state interests are furthered by the anti-SLAPP
 15 statute, that no identifiable federal interest would be
 16 undermined by applying the anti-SLAPP statute in
 17 diversity actions . . . The *Erie* doctrine applies to pendent
 18 state law claims to the same extent it applies to state law
 19 claims before a federal court on the basis of diversity
 20 jurisdiction. *See Nathan v. Boeing Co.*, 116 F.3d 422, 423
 21 (9th Cir.1997). Accordingly, it appears that under the *Erie*
 22 analysis set forth in *Lockheed* the anti-SLAPP statute may
 23 be applied to state law claims which, as in this case, are
 24 asserted pendent to federal question claims.

25 *Id.* at 1129-1130; *accord Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th
 26 Cir. 2003) ("Motions to strike a state law claim under California's anti-SLAPP
 27 statute may be brought in federal court").

1 C. **Defendant Red Hill has Met Its Burden Under the Anti-SLAPP**
 2 **Statute's First Prong**

3 Under the anti-SLAPP statute, a defendant carries the initial burden to show
 4 that the plaintiff's suit "arises from an act in furtherance of the defendant's rights of
 5 petition or free speech." California Code of Civil Procedure § 425.16(b)(1); *Vess*,
 6 317 F.3d at 1110. "The defendant need not show that the plaintiff's suit was brought
 7 with the intention to chill the defendant's speech; the plaintiff's 'intentions are
 8 ultimately beside the point.'" *Vess*, 317 F.3d at 1110 (quoting *Equilon Enters., LLC*
 9 *v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67).

10 An "act" includes (1) "any written or oral statement or writing made before a .
 11 . . . judicial proceeding, or any other official proceeding authorized by law; [or] (2)
 12 any written or oral statement or writing made in connection with an issue under
 13 consideration or review by a . . . judicial body, or any other official proceeding
 14 authorized by law." California Code of Civil Procedure § 425.16(e)(1) & (2).
 15 Here, obviously, Red Hill meets this burden. Plaintiff has specifically alleged Red
 16 Hill "wrongfully sued Plaintiff in a sham judicial foreclosure...."¹³

17 D. **Plaintiff Cannot Prevail Against Red Hill On Her**
 18 **Malicious Prosecution Claim.**

19 To prevail on her claim for malicious prosecution against Red Hill plaintiff
 20 must establish that, (1) Red Hill commenced, or directed the commencement of the
 21 Foreclosure Action which was pursued to a legal termination favorable to plaintiff;
 22 (2) the Foreclosure Action was brought by Red Hill, or at the direction of Red Hill
 23 without probable cause; and (3) was initiated by Red Hill, or at the direction of Red
 24 Hill with malice. *Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262,
 25 1271-1272.

26
 27 ¹³ Complaint, ¶ 1 at page 2 lines 6-8.

1 Here, plaintiff cannot prevail on her claim of malicious prosecution against
 2 Red Hill because she cannot satisfy the first element of a malicious prosecution
 3 claim. Red Hill did not file the Foreclosure Action and did not direct those who did.

4
 5 E. **Plaintiff Cannot Establish a Reasonable Probability of Success on**
 6 **Her Malicious Prosecution Claim Against Red Hill.**

7 Once a defendant meets the initial anti-SLAPP burden, the burden shifts – to
 8 the plaintiff – to establish, “**by competent and admissible evidence,**” a reasonable
 9 probability that he will prevail on his claims at trial. *Macias v. Hartwell*, 55 Cal.
 10 App. 4th 669, 675 (1997) (emphasis added). Plaintiff “cannot rely on the allegations
 11 of the complaint, but must produce evidence that would be admissible at trial.”
 12 *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004). The
 13 Court “should grant the [anti-SLAPP] motion if, as a matter of law, the defendant’s
 14 evidence supporting the motion defeats the plaintiff’s attempt to establish
 15 evidentiary support for the claim.” *Wilson v. Parker, Cover & Chidester*, 28 Cal.
 16 4th 811, 821 (2002).

17 Plaintiff cannot establish a reasonable probability she will prevail, because, as
 18 was previously discussed, Red Hill did not commence or prosecute the Foreclosure
 19 Action or direct those who did. Consequently, Red Hill’s motion must be granted.

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1 **V. CONCLUSION**

2 Based on the factually baseless allegation that Red Hill "...wrongfully sued
3 Plaintiff¹⁴...", plaintiff has sued Red Hill for malicious prosecution. Because
4 filing a law suit is an act protected by California Code of Civil Procedure §425.16,
5 having made this allegation, which Red Hill obviously disputes, the burden is on
6 plaintiff to establish a reasonably probability of success on her claim for malicious
7 prosecution. Plaintiff will not be able to meet this burden because Red Hill did not
8 commence or prosecute the Foreclosure Action nor direct those who did.
9 Consequently, Red Hill's motion must be granted.

10
11 DATED: January 31, 2013

STEPHEN H. TURNER
LEWIS BRISBOIS BISGAARD & SMITH LLP

12
13
14 By: 

15 Stephen H. Turner
16 Attorneys for Defendant RED HILL LAW
17 GROUP, P.C.
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27 ¹⁴ Complaint, ¶ 1, p. 2; line 6.

FEDERAL COURT PROOF OF SERVICE

Reyes v. Red Hill, etc., et al. - File No. 31614.25

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, CA 90012. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On January 31, 2013, I served the following document(s): **NOTICE OF MOTION, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT RED HILL LAW GROUP, INC.'S SPECIAL MOTION TO STRIKE (ANTI-LAPP-CAL. CODE CIV. PROC. 425.16)**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

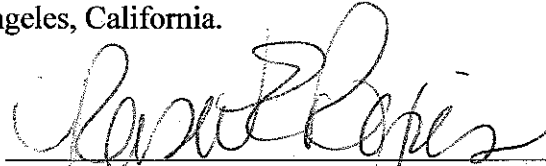
SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the State of CALIFORNIA that the foregoing is true and correct.

Executed on January 31, 2013, at Los Angeles, California.



ROSA E. ROJAS

SERVICE LIST
Reyes v Red Hill
5:12-cv-05811-EJD

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